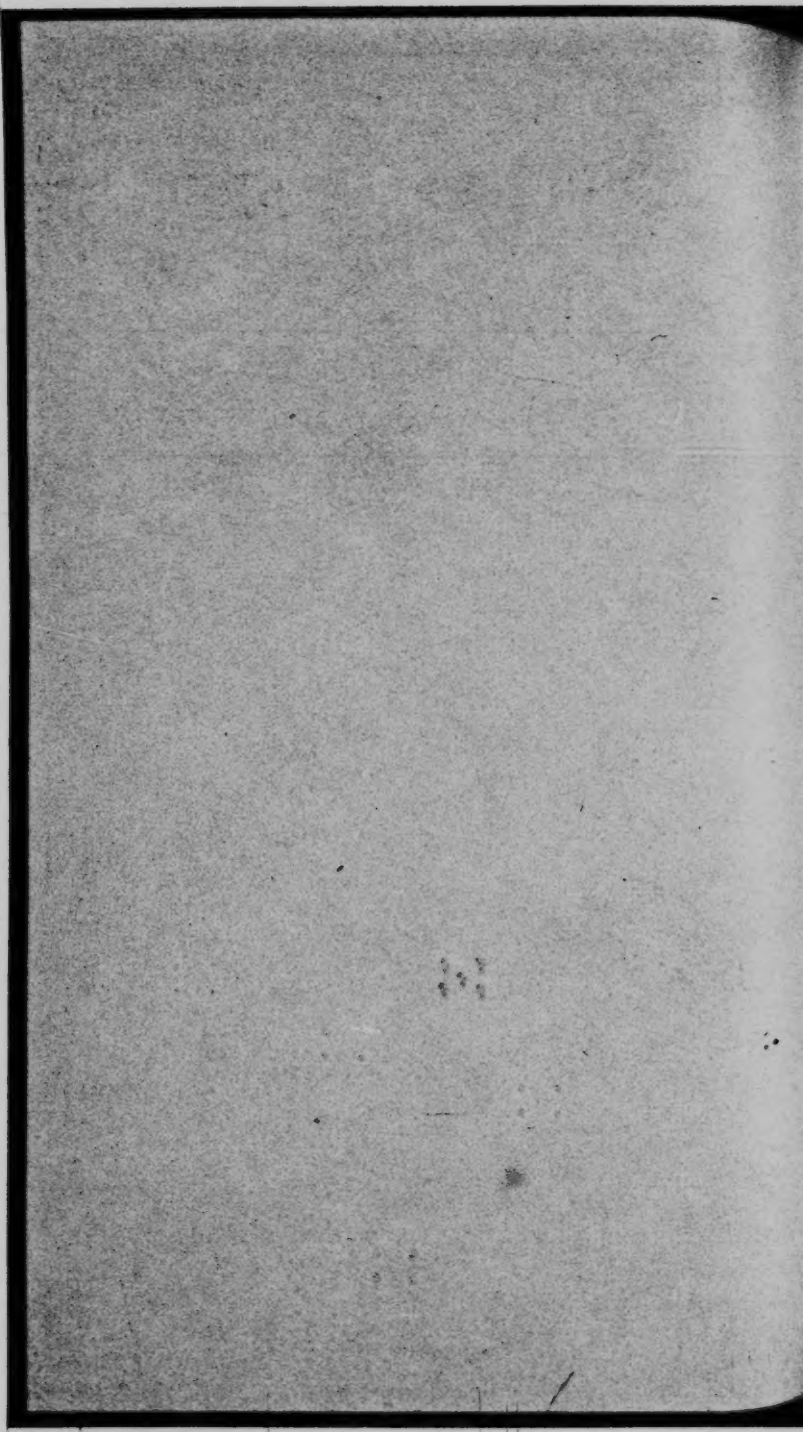

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1583

EDMUND G. BROWN, JR., Secretary of State of the State of California,

Appellant,

vs.

RAYMOND G. CHOTE,

Appellee.

On Appeal From the United States District Court for the Northern District of California

BRIEF FOR THE APPELLANT

Opinion Below

The opinion of the District Court is reported at 342 F. Supp. 1353.

Jurisdiction

The judgment of the District Court was entered March 9, 1972. (App. p. 34.) A notice of appeal to this Court was filed on April 7, 1972. (App. p. 44.) The jurisdictional statement was filed June 5, 1972, and probable jurisdiction was noted October 16, 1972. The jurisdiction of this court rests on 28 U.S.C. 1253.

Questions Presented

When challenged on Equal Protection grounds, is the standard of review of the California candidate filing fee system the traditional rational basis test, *i.e.*, the statutes will be set aside only if no rational basis can be conceived to justify them or must the statutes be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives?

Do sections 6552 and 6553 of the California Elections Code, which require the payment of a candidate filing fee of one percent of the first year's salary for the office of Representative in Congress as applied to a prospective candidate who is personally without sufficient property or money to pay the fee, operate to deny the Equal Protection of the laws?

Statutes Involved

California Elections Code section 6552 provides:

> "The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:
>
> "(a) Two percent of the first year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator or Assemblyman or to an office to be voted for in a district comprising more than one county.
>
> "(b) One percent of the first year salary for the office of Representative in Congress or for any office to be voted for in any district comprising more than one county, except the office of State Senator or Assemblyman.
>
> "(c) One percent of the first year salary for the office of State Senator or Assemblyman."

California Elections Code section 6553 provides:

"The filing fee required to be paid to the Secretary of State pursuant to subdivisions (a) and (b) of Section 6552 shall be paid to the county clerk at the time the forms for nomination are obtained from the county clerk. The filing fee required to be paid to the Secretary of State pursuant to subdivision (c) of Section 6552 shall be paid upon the filing of the candidate's declaration of his intention to become a candidate, pursuant to Section 25500, and such filing fee shall be nonrefundable. The county clerk shall not accept any papers unless the fees are paid at the time required by this section, or unless satisfactory evidence is given to the county clerk or to the registrar of voters that such fee has been paid at the time of the declaration of candidacy in another county. The county clerk shall transmit the fees to the Secretary of State at the time he delivers the declarations of candidacy for filing."

California Elections Code section 6554 provides:

"A filing fee of ten dollars ($10) shall be paid to the county clerk for filing a declaration of candidacy for an office to be voted for wholly within one county with the following exceptions:

"(a) No filing fee is required from any person to be voted for at the presidential primary.

"(b) No filing fee is required from any candidate for an office for which no fixed compensation is payable.

"(c) No filing fee is required for offices the compensation for which does not exceed the sum of six hundred dollars ($600) annually.

"(d) A filing fee of 1 percent of the annual salary of the office shall be paid to the county clerk by each candidate for a judicial office or for the office of district attorney.

"(e) The filing fee to be paid to the county clerk by each candidate for a county office, other than a judicial office and the office of district attorney, shall be the same percentage of the annual salary of the office as that provided for in subdivision (a) of Section 6552 of this code. This subdivision shall not apply to any candidate for any office for which the annual salary is two thousand five hundred dollars ($2,500) or less."

California Elections Code section 6556 provides:

"The county clerk shall pay to the county treasurer all fees received from candidates pursuant to Section 6554. Within 10 days after the direct primary, the Secretary of State shall pay to the State Treasurer all fees received from candidates pursuant to Section 6552, which shall be deposited in the General Fund.

"It is the intention of the Legislature that the funds deposited in the General Fund pursuant to this section will be used to support the State Commission on Voting Machines and Vote Tabulating Devices to the extent that appropriations are made in the Budget Act from year to year."

Statement of the Case

Appellee Chote desired to appear on the ballot for the June 6, 1972 California Primary Election as a nominee to be the Democratic candidate in the general election for the office of Representative in Congress from the 17th Congressional District.

California law provides for a party primary to select party nominees for partisan offices to be voted upon at the general election. (Cal. Const., art. II, § 2.5; Cal. Elec. Code §§ 6400 *et seq.*) For a candidate's name to appear on the primary ballot, the candidate or his sponsors must execute a declaration of candidacy (Cal. Elec. Code §§ 6490-6491) and must obtain and file sponsor certificates (not less than 40 nor more than 60 for Representative in Congress (Cal. Elec. Code §§ 6494-6495)). With the exception of certain noncompensated or low compensated offices (Cal. Elec. Code § 6554), candidates for state and local office must pay a filing fee of one or two percent of the first year salary of the office (Cal. Elec. Code §§ 6552-6554). Under statutes in effect at the most recent election for each office, the filing fee for state offices ranged from $192 for State Assembly, $425 for Congress, $850 for United States Senator (six-year term) and $982 for Governor (four-year term).

The party nominee selected at the primary does not pay another filing fee for the general election.

California law provides for a write-in candidacy at both the primary and general election. But write-in candidates must also file a declaration of candidacy and pay the statutory filing fee for the office. (Cal. Elec. Code §§ 18601-18604; 6555.) California provides an independent nomination process for the final election. (Cal. Elec. Code § 6800 *et seq.*) Independent candidate nominees must also pay the statutory candidate filing fees. (Cal. Elec. Code § 6802, 6552-6554.)

The sponsor certificates must be delivered to the county clerk at least 88 days prior to the direct primary election. (Cal. Elec. Code § 6499.) In 1972, the deadline was March 10.

On February 17, 1972, appellee obtained the declaration of candidacy and sponsor certificate forms from the Santa Clara County Registrar of Voters. Appellee obtained the forms by issuing a check in the sum of $425. Typed on the face thereof were the words "written under protest for filing fee." The check was admittedly worthless. (App. pp. 26, 29-30.) Appellee was informed that his name would not be placed on the primary ballot unless the check in payment of the filing fee was honored at the bank. (App. p. 7.)

On March 3, 1972, appellee commenced an action for declaratory relief and injunction in the United States District Court, Northern District of California. (App. pp. 3-9.) The Secretary of State was directed to show cause on or before March 8, 1972, why a preliminary injunction should not issue. (App. pp. 10-11.) On March 8, 1972, appellant filed written opposition to the granting of a preliminary injunction. (App. p. 12.) The application for a preliminary injunction was heard before the three-judge court on March 8, 1972. Appellee appeared in person without counsel. After argument, the matter was submitted for decision. (App. pp. 18-33.)

On March 9, 1972, the three-judge District Court, Justice Hamlin dissenting, granted a preliminary injunction enjoining appellant from enforcing or applying California Elections Code sections 6552 or 6553 as to appellee and the class represented by appellee. (App. pp. 34-39.) On March 23, 1972, appellant filed an answer to the complaint. (App. p. 41.)

On April 7, 1972, appellant filed a notice of appeal from the order granting a preliminary injunction. (App. p. 44.)

Summary of the Argument

The California candidate filing fee system differs in size of the fees and the method of computation from the Texas system characterized as "patently exclusionary" in *Bullock v. Carter*, 405 U.S. 134 (1972). The California fees are specified by state statute in a reasonable amount. The aggregate of fees collected represent only a reasonable portion of the governmental election costs. Because most candidates could be expected to pay the California fee from their own resources or through modest contributions (see: *Bullock v. Carter, supra*, 405 U.S. at 143), the California candidate fees do not realistically burden the exercise of voting rights to an extent which would require the statutes to withstand the more rigid standard of review applied in *Bullock v. Carter*.

Under the traditional "rational basis" test, the California candidate filing fee system furthers legitimate interests and does not unlawfully discriminate against candidates or voters. Even assuming that the more rigid standard of review applied in *Bullock* is applicable herein, the California statutes are reasonably necessary to the accomplishment of legitimate state objectives.

ARGUMENT

I

A Reasonable Candidate Filing Fee Does Not Discriminate Against Voters or Serious Candidates and Should Be Sustained Under the Traditional Equal Protection Standard of Review

A majority of the District Court held that as to indigent prospective candidates for public office, the California statutes requiring a candidate filing fee violated the Equal Protection Clause of the Fourteenth Amendment.

In determining whether a state law violates the Equal Protection Clause, the Court considers the facts and circumstances behind the law, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), the character of the classification, the individual interests affected by the classification, and the governmental interests asserted in support of the classification, *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). As the court noted in *Bullock v. Carter, supra*, 405 U.S. 134, 142 (1972):

> "The threshold question to be resolved is whether the filing-fee system should be sustained if it can be shown to have some rational basis, or whether it must withstand a more rigid standard of review."

See also:

McDonald v. Board of Election, 394 U.S. 802, 806-07 (1969).

In *Bullock v. Carter, supra*, 405 U.S. 134 (1972), the Court concluded that the Texas candidate filing fee system operated to deny the equal protection of the laws. That system required candidates to pay a fee

determined by the county executive committee of the political party conducting the primary as an apportioned cost of the primary; the assessed fees for the appellees in that case varied from $1,000 to $6,300; and there was no alternative procedure in Texas to appear on the primary ballot without the payment of a filing fee.

The Court in *Bullock* recognized that filing fees further legitimate governmental interests:

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. Jenness v. Fortson, 403 U.S., at 442; Williams v. Rhodes, 393 U.S., at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense of burden of runoff elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. Jenness v. Fortson, 403 U.S., at 442." (405 U.S. at p. 145.)

The Court in *Bullock* seemingly recognized that reasonable statutory candidate filing fees would not realistically have such an impact upon voters as to require the rigid standard of review. (405 U.S. at 143.)

Reasoning that a substantial group of supporters would have difficulty meeting the large fees imposed under the Texas system, the Court concluded that the Texas fee system was subject to "close scrutiny." The Court then concluded that the Texas system was not *necessary* to regulate the ballot nor was it *necessary* for a state to finance the entire cost of the primaries through candidate filing fees. The opinion of the Court concludes:

> "Since the State has failed to establish the requisite justification for *this* filing-fee system, we hold that it results in a denial of equal protection of the laws. *It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees* or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice. These salient features of the Texas system are critical to the determination of constitutional invalidity." (405 U.S. at 149; emphasis added.)

The California filing fees are set by statute not by political parties at a percentage of the annual salary of the office. A fee of one or two percent of the annual salary is a reasonable fee.

> *State ex rel. Apodaca v. Fiorina*, 83 N.M. 663, 495 P.2d 1379, 1384 (1972) (6% of first year's salary);

Spillers v. Slaughter, 325 F. Supp. 550 (M.D. Fla. 1971); *judgment vacated as moot, Pope v. Haimowitz,* 404 U.S. 806 (5% of annual salary);

Fowler v. Adams, 315 F. Supp. 592, 595 (M.D. Fla. 1970 (5% of annual salary);

Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970) (2% of annual salary);

Bodner v. Gray, 129 So. 2d 419, 420 (Sup. Ct. Fla. 1961), noted 89 A.L.R.2d 864 ($875 fee for office of justice of Supreme Court);

McLean v. Durhan County Board of Elections, 222 N.C. 6, 21 S.E. 2d 842 (1942) (1% of annual salary).

Nor does California place the burden of financing primary elections on the candidates. Under the California system, the candidate fees reimburse state and local government for only a reasonable portion of the total election cost.[1]

In considering the proper standard of review, this Court noted in *Bullock v. Carter, supra,* 405 U.S. at 143, that statutes such as California Elections Code sections 6552 and 6553 do not deprive voters of the opportunity to vote nor do they quantitatively dilute votes.

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[1]The Secretary of State is budgeted for over one million dollars for election expense of that office in 1972. The total fees forwarded to that office from candidates for Representative in Congress, State Senator, or Assemblyman in connection with the 1972 primary was $171,577.

The counties print the sample and final ballots, pay the election officers, purchase voting equipment. (Elec. Code § 10,000.) Thus, general tax funds provide the primary source of funds to defray election cost at both the state and local level.

The Court's opinion then continued:

> ". . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.
>
> "Unlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character." (405 U.S. at 143.)

Realistically, the California statutes do not invidiously discriminate against voters or prevent voters from voting effectively. Clearly, not all interest groups can have a hand-picked candidate on the ballot. Without a limitation upon the number of candidates running for office, voting machines and other mechanical devices would not function properly and the election processes could not proceed in an orderly fashion. The clogging of election machinery, voter confusion, fragmentation of vote resulting from a large numbers of candidates would tend to impede rather than assure an effective vote. The candidate filing fees actually developed from a political reform movement with the premise that reasoned choice was enhanced by reducing the number of choices to be made. (70 Mich. L. Rev. 558 (1972).)

Taking cognizance of the realistics of money in election campaigns (*see:* 46 N.Y.U. L. Rev. 900, 901; 60 Cal. L. Rev. 1371 (1972), the latter article noting that in 1970 the 35 winners of gubernatorial seats spent an average of $145,883 on the electronic media), voters

cannot realistically hope to elect "their" candidate without the financial ability to pay a reasonable candidate filing fee.

A candidate filing fee thus requires a segment of the voting population to realistically weigh their chances in supporting a candidate. If 425 voters believe in a candidate, $1 per voter will place their candidate on the ballot seeking the party nomination for Representative in Congress. Viewed in that context, the candidate's lack of personal resources is not a significant let alone a critical factor.

Furthermore, candidate filing fees should either be required of all candidates or of none. It is illogical to deter an employed community minded citizen who is reluctant to dip into his meager savings from running for office and yet afford a welfare recipient a place on the ballot.

It is reasonable to exclude some aspiring candidates from the ballot. It is reasonable to prevent the clogging of election machinery. It is reasonable to seek reimbursement for a small portion of the total election costs.

Accepting the clear implication of *Bullock* that the states are not powerless to impose some form of candidate filing fee, a reasonable fee which reimburses state and local treasuries for no more than a reasonable portion of the total election cost does not deny voters or candidates the equal protection of the laws.

II

Reasonable Candidate Fees Applicable to All Candidates Are Also Reasonably Necessary to Further Legitimate State Interests

California statutes have provided for candidate filing fees since 1909. The original fees, which then scaled from $10-50, were challenged and upheld by the State Supreme Court in *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 181 (1909). The Court's opinion in that case provided in part:

> "It is provided in the act that these fees are to be paid into the county or municipal treasury when they are paid by county or municipal candidates, and when paid by candidates for state or district nominations are to be apportioned and paid by the state treasurer to the county treasurer of the counties in which such candidates are to be voted for. The validity of this provision requiring the payment of fees is sustainable under the constitutional amendment, as being within the power of the legislature to provide reasonable conditions for the exercise of the rights granted by the primary law. As said by one court to which this question was presented: 'The right to exact a reasonable fee for the privilege of running for office may be sustained, on the principle that fees in actions and proceedings in courts, and for filing and recording papers, are sustainable; namely, that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the costs the state incurs in maintaining the instrumentality to carry into effect the particular proceeding. In other words the state asks the candidate for office

under a particular law to reimburse it for a part of the expenses it incurs in carrying that law into effect. This clearly the state may lawfully do.' (State v. Nichols, 50 Wash. 508, [97 Pac. 728, 730].)

"Aside from this, such a provision is a reasonable restriction and provides an orderly and systematic method by which the people may select their candidates for public office. The exaction of a fee tends to prevent an indiscriminate scramble for office. Where it is fixed at an amount that will impose no hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent the wholesale filing of petitions for nominations of any one regardless of whether or not he is a desirable candidate. It is but a reasonable means adopted by the legislature to regulate primary elections for the selection of candidates for public office. And the constitutional provision that no property qualification shall be required of any person to vote or hold office is not violated by such provision as to the payment of a fee, but is a reasonable regulation prescribed by the legislature on the wise assumption that any candidate who is of sufficient worth to stand before the people as a candidate for public office and whose candidacy calls for the payment of the fee required by the act will be at no difficulty to pay the required amount. (State v. Scott, 99 Minn. 145, [108 N.W. 829]; see also, Montgomery v. Schlef, 118 Ky. 766, [82 S.W. 389].)" (155 Cal. at 789-90.)

The state courts in other states have, as a general rule, upheld their candidate filing fee statutes as rea-

sonable legislation not violative of pertinent state constitutional provisions. For cases upholding a fee larger than a nominal fee for the services of offices processing the nomination papers, *see:*

Bodner v. Gray, supra, 129 So. 2d 419 (Sup. Ct. Fla. 1961) ($875 fee for office of justice of the supreme court not unreasonable);

Munsell v. Hennegan, 182 Md. 15, 31 A.2d 640 (1943) ($.25 a name of voters on nominating petition);

McLean v. Durham County Board of Elections, supra, 222 N.C. 6, 21 S.E.2d 842 (1942) (1% of the annual salary of the office);

State v. Brodigan, 37 Nev. 492, 143 Pac. 238 (1914) ($100 for office of Secretary of State);

State v. Nichols, 50 Wash. 508, 97 Pac. 728, 730 (1908) (Court describes as reasonable fee);

State v. Scott, 99 Minn. 145, 108 N.W. 828 (1906) ($10-20);

Kenneweg v. Allegany County Com'rs., 102 Md. 119, 62 A. 249 (1905) (fee scaled to office);

Montgomery v. Chelf, 118 Ky. 766, 82 S.W. 388, 390 (1904) (all candidates for two officers paid apportioned share of $800).

Some courts have either construed their state constitutions as precluding other than nominal fees or simply held the particular candidate fees arbitrary:

State v. Drexel, 74 Neb. 776, 105 N.W. 174 (1905) (1% of salary for full term of office);

People v. Board of Election Com'rs. of Chicago, 221 Ill. 9, 77 N.E. 321 (1906) (fees not related to services in filing the papers or the expenses of the election);

Ballinger v. McLaughlin, 22 S.D. 206, 116 N.W. 70 (1908); (maximum fee $15);

Johnson v. Grand Forks County, 16 N.D. 363, 113 N.W. 1071 (1907) (2% of the annual salary);

Ledgerwood v. Pitts, 125 S.W. 1036, 1045-1046 (1910); (scaled from $10 to $500);

Kelso v. Cook, 184 Ind. 173, 110 N.E. 987, 996 (1916) (1% of annual salary).

Subsequent to the advent of the new equal protection test in voting rights cases, several federal district courts refused injunctive relief against the Florida and California candidate filing fee systems.

Spillers v. Slaughter, 325 F. Supp. 550 (M.D. Fla. 1971), *vacated sub nom, Pope v. Haimowitz,* 404 U.S. 806;

Fowler v. Adams, 315 F. Supp. 592 (M.D. Fla. 1970), *appeal dismissed for lack of jurisdiction,* 400 U.S. 986 (1971); or 400 U.S. 1205 (1970);

Wetherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970);

Haag v. State of California, Unrep. (C.D. Cal. No. 70-426 R, March 18, 1970).

Several courts did not find sufficient state interests to justify the particular fees at least without a non-monetary alternative route to ballot listing.

Jenness v. Little, supra, 306 F. Supp. 925 (N. D. Ga. 1969), *appeal dismissed as moot sub nom., Matthews v. Little,* 397 U.S. 94 (1970);

Thomas v. Mims, supra, 317 F. Supp. 179, 181 (S.D. Ala. 1970);

Wong v. Mihaly, 332 F. Supp. 165 (N.D. Cal. (1971) (municipal charter);

Duncantall v. City of Houston, Texas, 333 F. Supp. 973 (S.D. Tex. 1971);

Socialist Workers Party v. Welch, 334 F. Supp. 179, 182 (S.D. Tex. 1971);

Johnston v. Luna, 338 F. Supp. 355 (N.D. Tex. 1972).

As noted in several law review articles on the subject of candidate filing fees, 60 Cal. L. Rev. 1371-1384 (1972), 70 Mich L. Rev. 558 (1972), 120 U. Pa. L. Rev. 109 (1971), 9 Santa Clara Lawyer 169 (1968), lower court decisions vary with the size of the fee, primary vs. final election and scope of judicial review, and cannot really be reconciled.

The state interests furthered by candidate fees are usually described as avoiding an indiscriminate scramble for office, limiting the size of the ballot to avoid voter confusion and fragmentation of votes, and to defray at least a portion of the cost of elections. Even assuming *arguendo,* that none of the interests, considered individually, is "compelling" or "reasonably necessary," evaluated in the aggregate the described interests outweigh any impact of reasonable filing fee requirements upon the interest of voters or candidates.

Actual experience has demonstrated that fears of lengthy ballots and frivolous candidates are not unfounded. In 1972, the Federal District Court in New Mexico invalidated that state's filing fee of six percent of the annual salary. *Dillon v. Fiorina,* 340 F. Supp. 729 (D. N.M. 1972). Thereafter, 28 candidates filed

for the Democratic nomination for United States Senator and 12 candidates filed for the Republican nomination for that office. Only four candidates paid filing fees. *See: State ex rel. Apodaca v. Florida, supra,* 495 P.2d 1379, 1381 (Sup. Ct. N.M. 1972).[2]

The conflicting lower court decisions could arguably lead to the following conclusions:

1. All candidate filing fees are invalid and cannot be imposed upon any candidate because any fee is a deterrent to qualified candidates whether the citizen is temporarily impoverished or regularly employed.

2. Reasonable candidate filing fees applicable to all candidates are valid.

3. Reasonable candidate filing fees are valid only if the state provides an alternative non-financial means of access to the ballot such as a nominating petition. However, a substantial nominating petition may involve money—either to actually gather the signatures or a government charge for checking the signatures. Also, nominating petitions are not necessarily a reliable gauge of support. (*See: State ex rel. Apodaca, supra,* 495 P.2d 1379 at 1383.) Finally, a substantial petition requirement could be challenged as a more burdensome requirement than imposed upon wealthy candidates.

4. The size of the fee is immaterial if the state provides a non-financial nominating petition as an alternative to the fee. (*But see: Johnson v. Luna, supra,* 338 F. Supp. 355 (N.D. Tex. 1972).)

It may be that *Bullock* established a new equal protection standard somewhere between the "rational

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[2]California has not had a real experience because the judgment below was rendered on March 9 and filing ended on March 10. Few candidates could complete and file the nomination papers in 24 hours.

basis" and the "compelling interest" tests. But as we read the opinion in that case, the Court did not intend to invalidate reasonable candidate filing fees in all states nor was the Court insisting that all states which utilize filing fees must experiment with a non-financial alternative means of access to the ballot. Thus, appellant submits that reasonable candidate filing fees applicable to all candidates are not a denial of Equal Protection of the laws.

Conclusion

For the reasons stated, it it respectfully submitted that the judgment of the court below, enjoining the enforcement or application of California Elections Code sections 6552 or 6553 as to appellee and the class represented by appellee, should be reversed.

Respectfully submitted,

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